Office - Supreme Court, U.S.
FILED
DEC 10 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1874

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, a body corporate, for and on behalf of FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

RICHARD C. DINKELSPIEL
MAXIMILIAN W. KEMPNER
Co-Chairmen
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Attorneys
Lawyers' Committee for Civil Rights Under Law
733 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6700

MICHAEL H. GOTTESMAN *
ROBERT M. WEINBERG
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
DAVID RUBIN
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 833-4451

Attorneys for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Doctrine of *Stare Decisis* Should Preclude Reexamination of This Court's Consistent Holdings That Exhaustion of State Administrative Remedies Is Not A Prerequisite To Suit Under 42 U.S.C. § 1983	4
II. The Congress That Enacted § 1983 Did Not Intend That A Plaintiff Be Required To Exhaust State Administrative Remedies As A Prerequisite To Suit Under § 1983	18
CONCLUSION	24

TABLE OF AUTHORITIES

Cases: Page

Allee v. Medrano, 416 U.S. 802 5
Allen v. McCurry, 449 U.S. 90 ..... 19, 21
Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 19
Apex Hosiery Co. v. Leader, 310 U.S. 469 17
Board of Regents v. Tomanio, 446 U.S. 478 .....7, 8, 20
Boys Markets v. Clerks Union, 398 U.S. 235 17
Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 ..... 9, 18
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393.... 9
Carey v. Piphus, 435 U.S. 247 19
Carter v. Stanton, 405 U.S. 669 5
Chardon v. Fernandez, —— U.S. ——, 50 L.W. 3341 ..... 6, 8
Cheatham v. United States, 23 Wall. (93 U.S.) 85.. 23
City of Columbus v. Leonard, 443 U.S. 905 6
City of Newport v. Fact Concerts, Inc., —— U.S. ——, 49 L.W. 4860 ..... 19, 21
Clyde v. United States, 13 Wall. (80 U.S.) 38 21-23
Collector v. Hubbard, 12 Wall. (79 U.S.) 1 22
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 17
Damico v. California, 389 U.S. 416 .....4-6, 9, 19
Delaware State College v. Ricks, 449 U.S. 250 ..... 6, 8
Edelman v. Jordan, 415 U.S. 651 9
Ellis v. Dyson, 421 U.S. 426 5
Erskine v. Hornbach, 14 Wall. (81 U.S.) 613 23
Fair Assessment in Real Estate Association, Inc. v. McNary, —— U.S. ——, 50 L.W. 4017 .....7, 8, 20
Flood v. Kuhn, 407 U.S. 258 ..... 16, 17
Gibson v. Berryhill, 411 U.S. 564 6
Gomez v. Toledo, 446 U.S. 635 19-21
Helvering v. Hallock, 309 U.S. 106 17
Houghton v. Shafer, 392 U.S. 639 ..... 5, 9
Huffman v. Pursue, Ltd., 420 U.S. 592 6
Illinois Brick Co. v. Illinois, 431 U.S. 720 8-9
Imbler v. Pachtman, 424 U.S. 409 21
King v. Smith, 392 U.S. 309 5
Laird v. Nelms, 406 U.S. 797 17

TABLE OF AUTHORITIES—Continued

Maine v. Thiboutot, 448 U.S. 1 9
McGee v. United States, 402 U.S. 479 20
McNeese v. Board of Education, 373 U.S. 668 .....4, 18-19
Missouri v. Ross, 299 U.S. 72 17
Monell v. New York City Dept. of Social Services, 436 U.S. 658 .....2, 17-19
Monroe v. Pape, 365 U.S. 167 .....4, 17, 18
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 20
Nicholl v. United States, 7 Wall. (74 U.S.) 122 23
Northwest Airlines, Inc. v. Transport Workers Union, —— U.S. ——, 49 L.W. 4383 19
Owen v. City of Independence, 445 U.S. 622 .....2, 19-21
Parratt v. Taylor, —— U.S. ——, 49 L.W. 4509.... 6
Philadelphia v. The Collector, 5 Wall. (72 U.S.) 720 23
Pierson v. Ray, 386 U.S. 547 21
Preiser v. Rodriguez, 411 U.S. 475 5
Runyon v. McCrary, 427 U.S. 160 6
Samuels v. Mackell, 401 U.S. 66 7
Steffel v. Thompson, 415 U.S. 452 ..... 7, 19
Tenney v. Brandhove, 341 U.S. 367 ..... 19, 21
Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 20
United States v. Sing Tuck, 194 U.S. 161 20
United States v. South Buffalo R. Co., 333 U.S. 771 ..... 16, 17
Wilwording v. Swenson, 404 U.S. 249 ..... 5, 9
Wood v. Strickland, 420 U.S. 308 ..... 19, 21
Wooley v. Maynard, 430 U.S. 705 6
Younger v. Harris, 401 U.S. 37 ..... 6, 7

Statutes

Civil Rights Act of 1866, 42 U.S.C. § 1981 8
Civil Rights Act of 1871, 42 U.S.C. § 1983 .....*passim*
Civil Rights Act of 1964:
Title II, 42 U.S.C. § 2000a 16
Title VII, 42 U.S.C. § 2000e 16
Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. § 1997e 10-16
Fair Housing Act of 1968, 42 U.S.C. § 3610 16

TABLE OF AUTHORITIES—Continued

Legislative Materials Page

Congressional Record 11-14
H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. (1980) 13,15,16
H. Rep. No. 96-80, 96th Cong., 1st Sess. (1979) 14-16
Hearings on H.R. 10 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st Sess. (1979) 11-14
Hearings on H.R. 2439 and H.R. 5791 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 1st Sess. (1977) 12, 14
S. Rep. No. 96-416, 96th Cong., 1st Sess. (1979) 14-16

Miscellaneous

Wyman, The Principles of Administrative Law Governing the Relation of Public Officers (1903) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1874

GEORGIA PATSY,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF FLORIDA, a body corporate, for and on behalf of FLORIDA INTERNATIONAL UNIVERSITY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR NATIONAL EDUCATION ASSOCIATION AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

INTEREST OF THE *AMICI CURIAE* [1]

The National Education Association (NEA) is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, virtually all of whom are employed by public educational institutions. One of NEA's purposes is to safe-

[1] The parties have consented to the filing of this brief.

guard the constitutional rights of teachers and other public educators.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee has over the past eighteen years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

Amici have a vital interest in the availability of prompt and complete relief in federal courts for those who are injured by the unconstitutional actions of public officials and entities. In pursuit of that interest, these *amici* have filed joint briefs in this Court in prior cases involving issues affecting the scope of 42 U.S.C. § 1983, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, *Owen v. City of Independence*, 445 U.S. 622. The issue in the instant case—whether state administrative remedies must be exhausted before instituting a § 1983 action—is another that will profoundly affect the availability of prompt relief under § 1983. Accordingly, *amici* have a vital interest in its sound resolution.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether, in an action brought pursuant to 42 U.S.C. § 1983, a district court may decline to hear a plaintiff's constitutional claim on the ground that the plaintiff did not exhaust administrative remedies provided by the state. For two reasons, we believe that the answer must be "no".

First, the outcome of this case should be governed by the doctrine of *stare decisis*. In a series of decisions spanning two decades, this Court has construed § 1983

as not containing any requirement that state remedies be exhausted, and, indeed, has decided other issues as to the application of § 1983 from the predicate that such exhaustion is never required. Congress, fully informed of these decisions, has chosen to legislate selectively—creating a carefully limited exhaustion requirement in one category of cases that it believed presented a special need for exhaustion, but otherwise refraining from overruling the no-exhaustion holdings of this Court. In the light of this congressional response, the question whether exhaustion may be required under § 1983 beyond the scope of Congress' recent dictates must be regarded as settled in the negative.

Second, even if the question were to be reexamined by this Court free of the restraint of *stare decisis*, the result would be the same. The question then would be one of statutory construction: whether the Congress that enacted § 1983 *intended* that victims of constitutional violations would have to exhaust state administrative remedies before invoking the protection of the federal courts. Section 1983 does not by its terms create an exhaustion requirement, and there is nothing in the legislative history from which such an intention could be inferred. Nor was a "tradition" of requiring exhaustion so well rooted in the law as of 1871 that Congress could be expected to have specifically so provided had it wished that tradition not to be applicable to § 1983. On the contrary, the "tradition" as of 1871—announced in contemporaneous Supreme Court decisions—was that exhaustion of administrative remedies was not required as a prerequisite to suit under a federal statute unless the statute expressly called for such exhaustion.

ARGUMENT

I. THE DOCTRINE OF *STARE DECISIS* SHOULD PRECLUDE REEXAMINATION OF THIS COURT'S CONSISTENT HOLDINGS THAT EXHAUSTION OF STATE ADMINISTRATIVE REMEDIES IS NOT A PREREQUISITE TO SUIT UNDER 42 U.S.C. § 1983.

A.

This Court first confronted the question whether state remedies must be exhausted before suing under § 1983 in *Monroe v. Pape*, 365 U.S. 167. Recognizing the question to be one of statutory construction, the Court surveyed in detail the relevant legislative history (*id.* at 172-183) and concluded as follows (*id.* at 183):

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

The state remedy involved in *Monroe* was judicial rather than administrative. But shortly thereafter in *McNeese v. Board of Education*, 373 U.S. 668, the Court held that the *Monroe* analysis was equally applicable to state *administrative* remedies. The Court stated that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided a remedy," and that the statutory purpose was "to provide a remedy in the federal courts supplementary to *any* remedy any state might have." *Id.* at 672 (emphasis added).

In *McNeese* the Court went on to observe that the state remedy at issue in that case may have been inadequate in any event (*id.* at 674-675), but the Court soon made clear that the holding in *McNeese* had not turned on the possible inadequacy of the state administrative remedy, and that exhaustion is not required irrespective of the "adequacy" of state administrative remedies, *Damico v. California*, 389 U.S. 416:

> The three-judge District Court dismissed the complaint solely because 'it appear[ed] to the Court that all of the plaintiffs [had] failed to exhaust *adequate* administrative remedies.' This was error. In *McNeese* . . ., noting that one of the purposes underlying the Civil Rights Act was 'to provide a remedy in the federal courts supplementary to any remedy any State might have' . . ., we held that 'relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an *adequate*] remedy' . . . See *Monroe v. Pape* . . . [*Id.* at 416-417 (brackets in original) (emphasis added).] [2]

The holding of *Damico*—that exhaustion of state administrative remedies is never required under § 1983—has been reaffirmed by the Court on numerous occasions. In *Wilwording v. Swenson*, 404 U.S. 249, as well as in *Houghton v. Shafer*, 392 U.S. 639, "[a]lthough the probable futility of [the] administrative appeals [available in those cases] was noted, [the Court] held that in 'any event, resort to these remedies is unnecessary.'" *Wilwording, supra*, 404 U.S. at 252. Similarly, in *Ellis v. Dyson*, 421 U.S. 426, 432-433, the Court declared: "[e]xhaustion of state judicial or administrative remedies . . . [is] not . . . necessary, for we have long held that an action under § 1983 is free of that requirement." See also *Carter v. Stanton*, 405 U.S. 669; *Allee v. Medrano*, 416 U.S. 802, 814; *Preiser v. Rodriguez*, 411 U.S. 475, 477, 492-493 n. 10, 494; *King v. Smith*, 392 U.S. 309, 312 n. 4.[3]

---

[2] Justice Harlan dissented in *Damico* precisely because he disagreed with the Court's holding "that there can be no requirement that a person dealing with an administrative agency . . . [must exhaust his administrative remedy], *no matter how adequate* his remedy [may be]." *Id.* at 418 n. (Harlan, J., dissenting) (emphasis added).

[3] Even those members of the Court who, over the years, have expressed doubts as to whether the cases in question were rightly decided have acknowledged that the cases do indeed establish the

Indeed, so well-settled is the principle that there is no exhaustion requirement under § 1983 that this Court has decided four cases involving *other* issues concerning the

---

proposition just stated. See *Damico, supra*, 389 U.S. at 418 n. (Harlan, J., dissenting); *Runyon v. McCrary*, 427 U.S. 160, 186 n. (Powell, J., concurring); *Parratt v. Taylor*, —— U.S. ——, 49 L.W. 4509, 4516 n. 13 (Powell, J., concurring in the result) (suggesting legislative action); *City of Columbus v. Leonard*, 443 U.S. 905 (Rehnquist, J., dissenting from denial of certiorari).

The court below thought that the clarity of this Court's repeated no-exhaustion rulings was clouded by *Gibson v. Berryhill*, 411 U.S. 564, and *Huffman v. Pursue, Ltd.*, 420 U.S. 592. The court below was mistaken.

In *Gibson*, a plaintiff obtained a judgment in a § 1983 action enjoining a state licensing board from conducting a hearing that had been scheduled by the Board. *Id.* at 569-570. In those circumstances the Court, after first noting that it "has expressly held in recent years that state administrative remedies need not be exhausted where the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983," added: "[w]hether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide." *Id.* at 574-575. That narrow question is not presented here, for petitioner claims already to have suffered a deprivation, and no state administrative proceeding is pending. Moreover, even were the exception discussed in *Gibson* to be recognized, this Court's subsequent decisions in *Delaware State College v. Ricks*, 449 U.S. 250, and *Chardon v. Fernandez*, —— U.S. ——, 50 L.W. 3341, discussed *infra*, p. 8, make clear that it could not be extended to cases in which a decision to deprive has been made albeit that decision is subject to review before any actual deprivation is to be suffered.

In *Huffman*, the Court created no exhaustion requirement for instituting § 1983 actions; rather, the Court there held only that the doctrine of *Younger v. Harris*, 401 U.S. 37, precludes the issuance of *an injunction against* "a state judicial proceeding as to which the losing party has not exhausted his state appellate remedies," 420 U.S. at 609. As the Court later emphasized in *Wooley v. Maynard*, 430 U.S. 705, 710-711, *Huffman* has no application outside the *Younger* context (i.e. in the absence of *pending* state court proceedings whose interruption is the object of the § 1983 action). *Younger*, of course, has no application to the instant case. As the Court observed earlier this Term, the *Younger* doctrine has been

application of § 1983 from the starting-point that § 1983 contains no exhaustion requirement, and has reached results that might not have been reached but for that predicate. In *Steffel v. Thompson*, 415 U.S. 452, this Court held that the principles of *Younger v. Harris*, 401 U.S. 37 and *Samuels v. Mackell*, 401 U.S. 66, are inapplicable to suits for declaratory relief where criminal prosecution is threatened but not yet instituted, explaining:

> When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights. *See, e.g., McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). But exhaustion of state remedies is precisely what would be required if both federal injunctive and declaratory relief were unavailable in a case where no state prosecution has been commmenced. [415 U.S. at 472-473].

In *Board of Regents v. Tomanio*, 446 U.S. 478, the Court held that the applicable statute of limitations for a suit under § 1983 is not tolled during the pendency of state proceedings invoked by the plaintiff. The Court reasoned that the statute of limitations governing a federal remedy should not be tolled during the pendency of state proceedings "unless that remedy is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had . . . ," *id.* at 490; and the Court recognized that § 1983 is not so structured: "[T]he District Court's conclusion that state remedies should be utilized before resort to the federal courts . . . does not square

---

limited in [its] application to federal cases which seek to enjoin state judicial proceedings." *Fair Assessment in Real Estate Association, Inc. v. McNary*, —— U.S. ——, 50 L.W. 4017, 4020. The plaintiff in the instant case does not seek to enjoin *any* state proceedings, let alone state *judicial* proceedings.

with what must be presumed to be congressional intent in creating an independent federal remedy." *Ibid.*

In *Delaware State College v. Ricks*, 449 U.S. 250, the Court ruled that the time limit for filing a § *1981* action challenging an employment decision as unconstitutional runs from the date of the allegedly discriminatory decision, and not from the later date, following the pursuit of administrative appeals, upon which the decision becomes effective to interrupt employment. This Term, in *Chardon v. Fernandez*, —— U.S. ——, 50 L.W. 3441, the Court applied the holding of *Ricks* to a similar action brought under § *1983*. In light of *Tomanio*, *supra*, only the Court's implicit assumption that exhaustion of administrative remedies is not required in § 1981 and § 1983 actions can account for the Court's rulings in these cases.

Finally, this Term, in *Fair Assessment in Real Estate Association, Inc. v. McNary*, —— U.S. ——, 50 L.W. 4017, the Court held that the principle of comity bars damage actions under § 1983 to redress the allegedly unconstitutional administration of a state tax system, reasoning in part that

> [T]he intrusiveness of such § 1983 actions would be exacerbated by the nonexhaustion doctrine of *Monroe v. Pape*, *supra*. Taxpayers such as petitioners would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety. [50 L.W. at 4021, see also *id.* at 4018.]

B.

In light of the repeated holdings of this Court over two decades that exhaustion of state administrative remedies is not required under § 1983, the doctrine of *stare decisis* strongly counsels against reexamination of that question. As stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-737:

> [C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free

> to change this Court's interpretation of its legislation. See *Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting). This presumption of adherence to . . . prior decisions construing legislative enactments would support . . . reaffirmance of [those decisions] . . . even if the Court were persuaded that [a contrary decision] is more consistent with the policies underlying the [statute] than is the [existing] rule.[4]

Accordingly, even if Congress had merely "remained quiet in the face of [the Court's] many pronouncements on the scope of § 1983", *Maine v. Thiboutot*, 448 U.S. 1, 8, it would not be appropriate for the Court now to undo the well-settled rule that exhaustion of state administrative remedies is not required under § 1983.[5]

---

[4] See also *Edelman v. Jordan*, 415 U.S. 651, 671 n. 14, quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (Brandeis, J., dissenting):

> Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.

And see *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 510-511 (Rennquist, J., dissenting).

[5] The court below, while recognizing "the numerous instances in which the Court has stated in opinions, apparently quite categorically, that exhaustion is not required in section 1983 cases," undertook to demonstrate that in each instance "the state remedies were sufficiently inadequate that exhaustion would not have been appropriate in any event." 634 F.2d at 906. Whether or not the cases *could* have been decided on such a ground, the fact remains that they *were not* so decided. To the contrary, in *Damico*, and again in *Houghton* and *Wilwording*, the Court took care to emphasize that exhaustion is not required regardless of the adequacy or inadequacy of particular administrative remedies. The determinative question for *stare decisis* purposes is whether Congress could have misunderstood this Court's prior rulings; those rulings did not leave room for misundertanding, and in any event we know that Congress did not misunderstand them (see pp. 10-12, *infra*).

But here the constraints of precedent are far more compelling, for Congress has not remained silent, but by its words and actions has expressed its recognition and acceptance of the no-exhaustion rule established in this Court's decisions. In Section 7 of the Civil Rights of Institutionalized Persons Act, P.L. 96-247, 94 Stat. 349 (1980), Congress adopted an exhaustion requirement for § 1983 suits brought by "adult[s] convicted of a crime confined in any jail, prison, or other correctional facility . . . ." 42 U.S.C. § 1997e(a)(1) (Supp. 1980). Under the statute, such persons can be required to exhaust "plain, speedy, and effective administrative remedies" that "are in substantial compliance with . . . minimum acceptable standards" promulgated by the Attorney General. § 1997e(a)(2).[6] If an adult prisoner has failed to exhaust such a remedy, the court may "continue [his § 1983] case for a period of not to exceed ninety days in order to require exhaustion" if the court finds "that such a requirement would be appropriate and in the interests of justice," § 1997e(a)(1).

From the hearings and debates leading up to the passage of this Act, several points that bear directly on the question presented by this case can be stated with certainty.

First, Congress fully understood that as it stands, § 1983 does not require exhaustion of administrative remedies. Representative Butler, a member of the subcommittee that first drafted the provision that became § 7, explained:

> [Section 7] provides that in certain cases a Federal judge may require a State prisoner, who has filed a 1983 petition, to go back and exhaust his State grievance procedure.
>
> * * * *

---

[6] The Act specifies detailed safeguards that are to be included in the Attorney General's standards, see p. 15, *infra*.

> *Under existing law there is no requirement that a complainant first ask the State prison system to help him. He can file his grievance directly in the federal court and his case has to be investigated by that court . . . .* [125 Cong Rec. H 3641 (daily ed. May 23, 1979).]

Similarly, Representative Sawyer expressed the view that § 7 would "go a long way to diminish section 1983 lawsuits, under which . . . State prisoners can go directly into Federal court with an action . . . ." *Id.* at H 3643. And in the prior Congress, where the House had passed a bill containing a provision virtually identical to § 7,[7] Representative Wiggins had stated:

> Mr. Chairman, it is settled law that an exhaustion of administrative remedies is not required as a precondition of maintaining a 1983 action. For many years, some of us have felt that the requirement of exhaustion of remedies would be desirable in the case of 1983 actions, but for various reasons it has been impossible to implement this requirement. The bill, however, makes a modest approach at an exhaustion of remedies requirement [124 Cong. Rec. H 7481 (daily ed. July 28, 1978)].

Similarly, Representative Ertel said:

> At the present time under 1983 a State prisoner can come directly into Federal court, file his petition with no notification to the State whatsoever, and the Federal court must take jurisdiction of that action under 1983.
>
> * * * *
>
> What section [7] does is require a prisoner to go to the State system before he goes into Federal court.
>
> * * * *

---

[7] In the 95th Congress the proposed legislation died in the Senate without a vote, due to a lack of time in the closing sessions. See Hearings on H.R. 10 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 96th Cong., 1st Sess. (hereinafter "1979 Hearings") at 1 (1979) (remarks of Rep. Kastenmeier).

> This has been one of the biggest controversies that has existed in 1983 that I know of, which is the fact that they can move directly into Federal court . . . . [*Id.* at H 4624 (daily ed. May 25, 1978)] [8]

Congress therefore enacted section 7—which was "strongly endorsed by the states"—in order to "*permit*"

---

[8] In the hearings that preceded the enactment of the statute, numerous witnesses stated flatly that § 1983 does not require exhaustion of administrative remedies, and no witness suggested anything to the contrary. Thus, Assistant Attorney General Drew Days testified:

> . . . I think it is important to understand something about the background of exhaustion requirements insofar as section 1983 . . . is concerned. The Supreme Court has repeatedly declined to require that a plaintiff in a section 1983 action exhaust State remedies, either judicial or administrative. The basis for that position taken by the Supreme Court is articulated in a case called the *McNeese* case . . . .

Hearings on H.R. 2439 and H.R. 5791 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice, 95th Cong., 1st Sess. (hereinafter "1977 Hearings") at 20 (1977). Mr. Days added that any exhaustion requirement adopted by Congress "would in fact be novel in light of the long and consistent history of case law in the 1983 area." *Id.* at 33. See also *Id.* at 323. Similarly, a spokesman for the American Bar Association advised the subcommittee that the ABA opposed the adoption of any exhaustion requirement for prisoner cases, because no other § 1983 plaintiffs are required to exhaust administrative remedies: "[C]reating an exhaustion requirement applicable to prisoners would make them in essence second class citizens, since other Americans face no similar obstacles to bringing Federal suits to secure federally protected rights." *Id.* at 47. Similar accounts of existing law were given by other witnesses throughout the 1977 hearings. See *id.* at 49, 52 (statement of Hon. Sylvia Bacon on behalf of the ABA); *id.* at 69, 77 (testimony of Jay Lichtman on behalf of National Legal Aid and Defender Association); *id.* at 253 (testimony of Stephen Berzon on behalf of the Children's Defense Fund); *id.* at 267 (statement of Michael Lottman on behalf of the Education Law Center); *id.* at 513-514 (letter of Prof. Richard Singer). In the 1979 hearings, the same point was made by the American Civil Liberties Union (see 1979 Hearings, *supra*, at 48), the ABA (*id.* at 340-341), and the NAACP Legal Defense and Educational Fund (*id.* at 349).

a federal court to order a continuance for the purpose of exhausting administrative remedies in the narrow circumstances specified in the legislation. *Id.* at H 3358 (daily ed. May 1, 1978) (remarks of Rep. Kastenmeier, Chairman of the House Subcommittee on Courts, and principal sponsor of the legislation) (emphasis added). See also H. Conf. Rep. No. 96-897, 96th Cong., 2d Sess. 9 (1980) (§ 7 will *"allow* a court to continue a case for a limited period of time") (emphasis added).

Second, in making what it knew to be the first incursion upon the no-exhaustion principle of § 1983, Congress was extremely selective. It did not, of course, impose an exhaustion requirement for all § 1983 actions; and, even more revealing, it did not impose an exhaustion requirement even as to all persons covered by the bill it was enacting. The Institutionalized Persons Act applied generally to a much broader category of persons in "institutions," § 1997(1), but the section of the Act creating an exhaustion requirement was limited to convicted adult prisoners (thus imposing no exhaustion requirement upon those in institutions other than correctional facilities, nor upon youth and non-convicted adults in correctional facilities, all of whom were covered by the Act's other provisions).

As the legislative history makes clear, Congress was not hostile to this Court's general "no exhaustion" construction of § 1983. On the contrary, aware that *any* legislative move toward exhaustion might be "resisted as a possible encroachment on civil liberties; that is to say, in the free, unimpeded resort to 1983; because it does deflect 1983 petitions . . .—temporarily in any event—back into the State system," 1979 Hearings, *supra* at 26 (remarks of Rep. Kastenmeier),[9] Congress

[9] Several organizations did in fact oppose the measure for that reason. See the testimony cited in note 8, *supra*, on behalf of the American Bar Association, American Civil Liberties Union, NAACP Legal Defense and Educational Fund, National Legal Aid and Defender Association, Children's Defense Fund, and Education Law Center.

acted only because it concluded that prisoner suits presented a unique problem warranting a unique solution (*i.e.* an exhaustion requirement). A recurring theme sounded by the legislators was that prisoner suits require special treatment because, as the Senate Report put it, "[t]he almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context." S. Rep. No. 96-416, 96th Cong., 1st Sess. 34 (1979).[10] Congress also believed that development of meaningful grievance procedures would be particularly desirable in the prison context, because such procedures could boost morale, settle disputes before they escalated, and generally improve the functioning of prisons.[11] Concluding that these objectives would be served by the development and compelled utilization of prison grievance procedures, Congress enacted § 7, which "has application only to the prison problem." 125 Cong. Rec. H 3648 (daily ed. May 23, 1979) (remarks of Rep. Gudger).

---

[10] See also 125 Cong. Rec. H 3639 (daily ed., May 6, 1979) (remarks of Rep. McClory); *id.* at H 3635 (remarks of Rep. Harris); *id.* at H 3641 (remarks of Rep. Butler). In the hearings, Representative Railsback, who was the author of § 7 (see 1979 Hearings, *supra* at 3), explained that an exhaustion requirement for prisoner suits was warranted in light of the fact that "[s]uch suits are . . . approximately 5 percent of the civil caseload of all federal district courts. A petition filed under 1983 is handwritten by the inmate without the assistance of a lawyer and is very difficult to process." *Id.*, at 4. See also 124 Cong. Rec. H 3358, 3365 (daily ed., May 1, 1978) (remarks of Rep. Railsback).

[11] See 124 Cong. Rec. H 3358-3359 (daily ed., May 1, 1978) (remarks of Rep. Railsback); 1977 Hearings, *supra*, at 147-148 (remarks of Rep. Railsback); H. Rep. No. 96-80, 96th Cong., 1st Sess. 23-24 (1979). Some advocates of prisoners' rights agreed with that assessment. See 1979 Hearings, *supra*, at 91 (testimony of the Office of Public Advocate for the State of New Jersey).

Third, even for the narrow category of persons to whom an exhaustion requirement was made applicable by the Act, Congress did not enact the "traditional" exhaustion requirement with its "traditional exceptions" —the standard read into § 1983 by the court below (634 F.2d at 903-904). Instead, Congress constructed an entirely novel scheme, under which the Attorney General is to promulgate "minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances," containing at least five unique features:

> (1) "an advisory role for employees and inmates . . . in the formulation, implementation, and operation of the system" [§ 1997(e)(b)(A)];
>
> (2) "specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system" [*id.*, (B)];
>
> (3) "priority processing of grievances . . . of an emergency nature" [*id.*, (C)];
>
> (4) "safeguards to avoid reprisals . . ." [*id.* (D)]; and
>
> (5) "independent review of the disposition of grievances . . . by a person or other entity not under the direct supervision or direct control of the institution" [*id.*, (E)].[12]

Exhaustion can be required only if the institution's procedures are "in substantial compliance with" the Act's standards, § 1997e(a)(2),[13] and even then only if the

---

[12] The five features are discussed in detail in H. Rep. No. 96-80, *supra*, at 23-24.

[13] The Conference Committee stated: "It is the intent of Congress that the phrase 'in substantial compliance with' means that there be no omission of any essential part from compliance, that any omission from compliance consists only of unimportant defects or omissions, and that there has been a firm effort to fully comply with the standards." H. Conf. Rep. No. 96-897, *supra*, at 17 (1980). See also H. Rep. No. 96-80, *supra*, at 25 (1979), S. Rep. No. 96-416, *supra*, at 34 (1979).

court finds that such exhaustion "would be appropriate and in the interests of justice," § 1997e(a)(1).[14] Moreover, institution of suit without prior exhaustion does not invite dismissal, but rather a continuance for at most 90 days during which the procedures must be pursued, *ibid.*[15]

In sum, the legislative response to this Court's holdings that exhaustion of administrative remedies is not required with respect to suits under § 1983 has been "something other than mere congressional silence and passivity," *Flood v. Kuhn*, 407 U.S. 258, 283. Congress is fully aware of this Court's decisions, and its failure to enact a general exhaustion requirement for § 1983 suits "has not been from inadvertence or failure to appreciate the effect of the Court's interpretation" of the statute. *United States v. South Buffalo R. Co.*, 333 U.S. 771, 774-775. Rather, Congress has deliberately chosen to enact a carefully-defined exhaustion requirement—one that could not be replicated by courts attempting to import a general exhaustion requirement into § 1983—to fit a class of

---

[14] The Conference Committee stated: "It is the intent of the Congress that the court not find such a requirement appropriate in those situations in which the action brought pursuant to 42 U.S.C. 1983 raises issues which cannot, in reasonable probability, be resolved by the grievance resolution system, including cases where imminent danger to life is alleged. Allegations unrelated to conditions of confinement, such as those which center on events outside of the institution, would not appropriately be continued for resolution by the grievance resolution system." H. Conf. Rep. No. 96-897, *supra*, at 15. See also H. Rep. No. 96-80, *supra* at 25; S. Rep. No. 96-416, *supra* at 34.

[15] In civil rights legislation apart from § 1983, Congress, when it has opted to require exhaustion of state remedies, likewise has departed from "traditional" exhaustion concepts, in each instance adopting a precisely tailored exhaustion scheme. See, *e.g.*, Title II of the Civil Rights Act of 1964 (public accommodations), 42 U.S.C. §§ 2000a-3(c), 3(d), 6(a); Title VII of the Civil Rights Act of 1964 (employment), 42 U.S.C. § 2000e-5(c); Fair Housing Fair Act of 1968, 42 U.S.C. § 3610(c), (d).

§ 1983 cases in which Congress regards exhaustion as appropriate, leaving § 1983 otherwise unchanged. In the light of this Congressional response, the question is no longer open to reexamination by this Court; Congress has evidenced that *it* will define the occasions for requiring exhaustion (and the kind of exhaustion to be required), and its failure to date to do so more broadly "is persuasive evidence of the adoption by [Congress] of the judicial construction" that § 1983 does not require exhaustion of administrative remedies. *Missouri v. Ross*, 299 U.S. 72, 75. See also, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 487-488. Congress "has clearly evinced a desire not to disapprove [this Court's decisions] legislatively." *Flood v. Kuhn*, 407 U.S. 258, 283-284. The doctrine of *stare decisis* applies with its greatest force in such cases; indeed, in such cases the Court has declined to overrule precedents even where convinced that the earlier cases were wrongly decided. *Flood v. Kuhn*, *supra*; *United States v. South Buffalo R. Co.*, *supra*; *Laird v. Nelms*, 406 U.S. 797, 802.[16]

---

[16] This case presents none of the circumstances in which the Court has found it appropriate to overrule a decision construing a statute notwithstanding the constraints of *stare decisis*. *In Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, the Court overruled its earlier holding in *Monroe v. Pape* that municipalities are not "persons" suable under § 1983. In so doing, the Court emphasized that *Monroe's* holding on that point had been "a departure from prior practice," 436 U.S. at 695, and was inconsistent with cases decided by the Court both before and after *Monroe* in which school boards had been held liable under § 1983, *id.* at 695-696. Similarly, the Court has in certain cases refused to follow a precedent found to conflict with "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Boys Markets v. Clerks Union*, 398 U.S. 235, 241, quoting *Helvering v. Hallock*, 309 U.S. 106, 119. See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47. No such basis for departing from *stare decisis* exists in this case.

Monell also turned on the fact that continued adherence to *Monroe's* holding with respect to municipal immunity "would itself be inconsistent with recent expressions of congressional intent." 436

II. THE CONGRESS THAT ENACTED § 1983 DID NOT INTEND THAT A PLAINTIFF BE REQUIRED TO EXHAUST STATE ADMINISTRATIVE REMEDIES AS A PREREQUISITE TO SUIT UNDER § 1983.

We have shown that the Court should not undertake in this case to determine the correctness of its prior decisions holding that exhaustion of state administrative remedies is not required under § 1983; the matter should be regarded as settled, subject only to any action Congress might take to revise the law. But if the Court *were* free to reconsider the matter, the same result would be required, for it is clear that the Congress that enacted § 1983 did not intend that a plaintiff be required to exhaust state administrative remedies.

The question is one of statutory construction: did Congress, in enacting § 1983, intend that resort to the statute could only be had after a plaintiff had exhausted state administrative remedies? That this issue turns solely on "the construction of . . . § 1983" was recognized by the Court in *Monroe v. Pape*, *supra*, 365 U.S. at 168; and in *Monroe* and subsequent cases the Court has consistently based its holdings with respect to exhaustion of remedies in suits under § 1983 on the intent of the Congress that passed the statute, as reflected in the language of the statute and its legislative history. See *id.* at 170-183; *McNeese v. Board of Education*, *supra*, 373 U.S. at

---

U.S. at 696-699. See also *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 497-498 (precedent may be overruled where subsequent action by Congress "has indicated that a number of premises" on which the prior decision was based were wrong). As we have shown, this case presents precisely the opposite circumstance—one in which Congress has understood and accepted this Court's rulings.

And finally, as we show in Part II, *infra*, this case, unlike *Monell*, is not one in which "it appear[s] beyond doubt from the legislative history" that the Court's prior decisions were wrong, 436 U.S. at 700. On the contrary, this case is one in which it is beyond doubt that the prior decisions were *right*.

671-673; *Damico v. California*, *supra*, 389 U.S. at 416-417; *Steffel v. Thompson*, *supra*, 415 U.S. at 472-473.[17]

---

[17] This has been the Court's approach to resolving other questions as to the meaning of § 1983 as well. Just last Term, in addressing the question of the applicability of collateral estoppel in a § 1983 suit brought by a plaintiff following his conviction in a state court, this Court emphasized: "Our decision does not 'fashion' any doctrine of collateral estoppel at all. Rather, *it construes § 1983* to determine whether the conventional doctrine of collateral estoppel applies to the case at hand." *Allen v. McCurry*, 449 U.S. 90, 95 n. 7 (emphasis added). Thus, the Court based its decision in *Allen* on "the statute and its legislative history." *Id.* at 97.

Similarly, the Court has viewed the question of immunities from liability under § 1983 as "essentially one of statutory construction." *Owen v. City of Independence*, 445 U.S. 622, 635. See also *City of Newport v. Fact Concerts, Inc.*, —— U.S. ——, 49 L.W. 4860, 4862-63; *Gomez v. Toledo*, 446 U.S. 635, 639-640; *Monnell*, *supra*, 436 U.S. at 664-689, *Wood v. Strickland*, 420 U.S. 308, 314, 316; *Tenney* v. *Brandhove*, 341 U.S. 367, 372, 376. And see *Carey v. Piphus*, 435 U.S. 247, 255, 258-259 (determining the nature of damages that may be awarded under § 1983 by reference to the intent of the 1871 Congress).

The court below did not purport to find its exhaustion requirement in the intent of the Congress that enacted § 1983; rather, it proceeded as if the question whether to impose an exhaustion requirement is one of federal common law to be determined by the judiciary (634 F.2d at 902-903). Even if that were generally true of exhaustion questions—and it is not, see n. 18, *infra*, and cf. *Northwest Airlines, Inc. v. Transport Workers*, —— U.S. ——, 49 L.W. 4383—the courts would have no such freedom with respect to § 1983. For in light of Congress' recent actions, recounted above, it is clear that the choice whether (and in what instances) to establish exhaustion requirements under § 1983 (including the determination of the *kind* of procedures to be exhausted) is "a policy matter that Congress has reserved for itself," in which "th[e] courts are not free to fashion . . . new rules . . ." *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 269. "What Congress has done . . . is to make specific and explicit provisions," *id.* at 260, and "[u]nder this scheme of things, it is apparent that the circumstances under which [exhaustion is] to be required and the range of discretion of the courts in [requiring exhaustion] are matters for Congress to determine," *id.* at 262.

It follows that "the starting point in our analysis must be the language of the statute itself." *Owen v. City of Independence*, 445 U.S. 622, 635. See also *Gomez v. Toledo*, 446 U.S. 635, 640. By its terms, § 1983 makes "no mention of any requirement that state remedies be exhausted before resort to the federal courts could be had under 28 U.S.C. § 1343." *Fair Assessment, supra*, 50 L.W. at 4018. Instead, § 1983 provides unequivocally that "[e]very person" who, under color of state law, deprives another of federal rights "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." Nor is this a statute that itself contains an administrative enforcement mechanism, such that a requirement to exhaust the "prescribed administrative remedy" can be inferred from the overall structure of the statute.[18] Rather, § 1983 is in no way "structured to require previous resort to state proceedings . . . ." *Board of Regents v. Tomanio, supra*, 446 U.S. at 490. We have read the legislative history of § 1983 in its entirety, and there is not a word to suggest that Congress meant to require exhaustion of state judicial or administrative remedies as a prerequisite to suit under § 1983.

---

[18] *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51. Cf. *McGee v. United States*, 402 U.S. 479, 484-485 n. 6 (exhaustion requirement may be inferred where necessary to preserve "the autonomy and proper functioning of the particular administrative system Congress has enacted"). The decisions of this Court that gave birth to the modern doctrine of exhaustion of administrative remedies were based on the rationale approved in *McGee*. See, e.g., *United States v. Sing Tuck*, 194 U.S. 161, 167 (1904) (exhaustion required where a statute, while not expressly mandating exhaustion, "points out a mode of procedure" that the Court concluded Congress intended "must be followed before there can be a resort to the court."). Cf. *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439-441 (1907) (ICC must be given primary jurisdiction over claims challenging rates it has approved, in order to effectuate the statutory objective that uniform rates be established by an expert body).

While the absence in the statute and the legislative history of any indication that Congress intended to require exhaustion of state remedies might ordinarily end the matter, this Court has held that in certain instances limitations not stated in the language of § 1983 or in the legislative history may nevertheless be applied in suits under the Act, if they "were both 'well established at common law' and 'compatible with the purposes of the Civil Rights Act." *Gomez v. Toledo, supra*, 446 U.S. at 639, quoting *Owen v. City of Independence, supra*, 445 U.S. at 638. Thus, the Court has "on several occasions, found that a tradition . . . was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Owen, supra*, 445 U.S. at 637, quoting *Pierson v. Ray*, 386 U.S. 547, 555.[19]

That rule of construction has no application here, however, for in 1871 there was no "tradition" that administrative remedies had to be exhausted before a governmental body could be sued. On the contrary, the rule at that time was that exhaustion could not be required unless Congress expressly provided for exhaustion by statute.

For example, in *Clyde v. United States*, 13 Wall. (80 U.S.) 38 (1871), the Court considered a "rule of practice" adopted by the Court of Claims, under which a claim against the government would not be entertained by that court if "the case was such as is ordinarily settled in any executive department" and the claimant had failed "[to] show that [an] application for . . . allowance [of the claim] had been made to that department, and without success." The Supreme Court overturned

---

[19] See also *City of Newport v. Fact Concerts, Inc.*, —— U.S. ——, 49 L.W. 4860, 4864; *Allen v. McCurry, supra*, 449 U.S. at 97-101; *Imbler v. Pachtman*, 424 U.S. 409, 417-424; *Wood v. Strickland*, 420 U.S. 308; *Tenney v. Brandhove*, 341 U.S. 367, 376.

the exhaustion rule the Court of Claims had adopted, stating (*id.* at 39):

> [W]e are of opinion that it was not competent for the Court of Claims to impose [such a rule] as a condition of presenting a claim in that court. Instead of being a rule of practice, it was really an additional restriction to the exercise of jurisdiction by that court. *It required the claimant to do what the acts giving the court jurisdiction did not require him to do before it would assume jurisdiction of his case.*
>
> The act of 1855, which created the court, declares that it shall "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." The rule adopted by the court required that the claimant should not only have such a claim as stated in the act, but should have first gone through the department which might have entertained it, before he would be permitted to prosecute in that court. *This was establishing a jurisdictional requirement which Congress alone had the power to establish.* [Emphasis added]

In *The Collector v. Hubbard*, 12 Wall. (79 U.S.) 1 (1871), the Court discussed a statute that *did* expressly require exhaustion,[20] but observed that prior to its adoption no such exhaustion was required:

> [I]t is quite clear that [prior to the 1866 statute] the tax payer, if he was illegally assessed, might

---

[20] The statute in question was the Act of July 2, 1866 (14 Stat. 152), which provided that "[n]o suit shall be maintained in any court for the recovery of any [federal] tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue."

> maintain an action . . . to recover back the amount . . . although he ha[d] not taken any appeal to the Commissioner of Internal Revenue.

For that proposition the Court cited *Philadelphia v. The Collector*, 5 Wall. (72 U.S.) 720, 730 (1867), where the Court rejected the theory that jurisdiction over suits to recover tax payments could be denied "because the party aggrieved may appeal to the commissioner for redress":

> Suffice it to say . . . that such a theory finds no substantial support in any act of Congress upon the subject or in any decided case.

And, in *Erskine v. Hornbach*, 14 Wall. (81 U.S.) 613, 615-616 (1872), the Court demonstrated how narrowly even express statutory exhaustion requirements were construed in that era: a statute requiring prior appeal to the Commissioner of Internal Revenue before suit could be filed to recover taxes was held not to require such a prior appeal to the Commissioner before an action in trespass could be instituted to recover property seized in the enforcement of an assessment.

The "tradition" as it stood in 1871, and indeed as it continued until early in the 20th Century, was accurately stated in a 1903 treatise: "unless there is statutory provision" requiring exhaustion,

> the law stands that although the matter may be brought before the administration [i.e., the agency] for its adjudication, it need not be so. A suit may be brought against the officer in the ordinary courts of law at any time.

Wyman, *The Principles of Administrative Law Governing the Relations of Public Officers* 339 (1903) (emphasis added).[21]

---

[21] Of course, as the treatise noted, exhaustion of remedies could be required where explicitly mandated by statute. See, *e.g.*, *Cheatham v. United States*, 23 Wall. (93 U.S.) 85 (1876); *Nicholl v. United States*, 7 Wall (74 U.S.) 122 (1869).

Thus, exhaustion of administrative remedies was not required as of 1871 except where specifically mandated by statute; indeed, it was error for a court to require exhaustion except where commanded by statute. *Clyde v. United States, supra.* Accordingly, when Congress enacted § 1982 with no mention whatsoever of exhaustion, Congress could not have intended to require (or expected the courts to infer from its silence a requirement) that state administrative remedies be exhausted before suits would be entertained under the statute.

CONCLUSION

For the reasons set forth above, this Court should hold that exhaustion of state administrative remedies is not required in actions under § 1983.

Respectfully submitted,

RICHARD C. DINKELSPIEL
MAXIMILIAN W. KEMPNER
Co-Chairmen
WILLIAM L. ROBINSON
NORMAN J. CHACHKIN
Attorneys
Lawyers' Committee for
Civil Rights Under Law
733 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 628-6700

MICHAEL H. GOTTESMAN *
ROBERT M. WEINBERG
JEREMIAH A. COLLINS
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
DAVID RUBIN
National Education Association
1201 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 833-4451

Attorneys for Amici Curiae

* Counsel of Record